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THE DAVIS DILEMMA. HOW TO PREVENT BATTLES OVER FROZEN PREEMBRYOS¹

Cryopreservation of preembryos, or the freezing of fertilized human eggs, is a procedure increasingly used by infertile couples to improve the odds of success of advanced reproductive technologies. As a consequence, divorcing couples are finding themselves in dispute over the disposition of frozen preembryos that have not been implanted. Courts have been called on to decide to whom the frozen preembryos should be awarded, but the law is unclear whether frozen preembryos should be treated as marital property, as children, or as something else. The author analyzes various arguments concerning the appropriate legal status of frozen preembryos, and suggests a new rule to settle such disputes.

INTRODUCTION

THE LAST DECADE has witnessed tremendous growth in the field of in vitro fertilization ("IVF").² IVF has inspired great joy in its proponents and beneficiaries, and great fear in its critics. Supporters of IVF point to the 15,000 children born through the miracle of IVF,³ while critics note the unresolved legal and ethical dilemmas posed by this technology.⁴

IVF has generated legal problems stemming from disputes over control and ownership of preembryos. These disputes fall into two categories: disputes between IVF participants and their clinic,⁵ and disputes between the IVF participants themselves.⁶

1. For the purposes of this note, it is helpful to distinguish between different stages of embryonic development. A "preembryo" refers to a zygote, or fertilized egg, not yet implanted in the uterus. Implantation normally takes place approximately 10-14 days after conception. See *infra* notes 27-37 & 116-20 and accompanying text.

2. In vitro fertilization is a reproductive technology involving the extracorporeal fertilization of a human egg. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 942 (1986).

3. See Smothers, *Embryos in a Divorce Case: Joint Property or Offspring?* N.Y. Times, Apr. 22, 1989, at 1, col. 5 (5,500 of these children were born in the United States).

4. See, e.g., Suro, *Vatican Asks Governments to Curb Birth Technology and to Outlaw Surrogates*, N.Y. Times, Mar. 11, 1987, at 1, col. 6 (Vatican condemns IVF due to the likelihood of unforeseeable and damaging consequences to society).

5. See, e.g., *York v. Jones Institute*, 717 F. Supp. 421 (E.D. Va. 1989) (hospital

This note focuses on disputes between spouses who, after participating in an IVF program, no longer agree on the disposition of their preembryos. This type of dispute is occurring with increasing frequency⁷ and has recently received a great deal of media attention.⁸ *Davis v. Davis*,⁹ decided in September 1990, illustrates the controversy that can arise when an infertile couple begins the IVF process with the hope of having a child but then decides to divorce. Cases like *Davis* challenge courts and legislatures to develop a principled approach to balancing the spouses' conflicting interests.

This note examines the issues involved in adjudicating disputes in which one spouse favors implantation and the other objects. It focuses on the facts of the *Davis* case as they existed at the time the case was presented to the trial court, when the wife sought implantation over her husband's objection.¹⁰ This note will also address the questions that would be posed if the *Davis* facts

refused to release couple's preembryos for transfer to another hospital); *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588, slip op. at 6 (S.D.N.Y. Nov. 14, 1978) (suit against hospital for abandoning then-experimental IVF technology and destroying couple's preembryos). In Australia a law was enacted specifically to determine the fate of preembryos upon the death of their genetic parents, Mario and Elsa Rios, in a plane crash. The law permitted adoption of these preembryos and provided that any of the preembryos brought to term would have no rights in the Rios estate. See Note, *Frozen Embryos: Moral, Social, and Legal Implications*, 59 S. CAL. L. REV. 1079, 1081 n.18 (1986).

6. For simplicity, this note refers to IVF participants as spouses or as husband and wife. Although there is no biological reason for IVF participants to be married, virtually all couples seeking IVF treatment are spouses. See *infra* note 223 and accompanying text. Furthermore, IVF participants need not remain married to each other after they have created preembryos. See, e.g., *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990) (husband and wife divorced, leaving disposition of seven frozen preembryos in dispute).

7. See Smothers, *supra* note 3, at 8, col. 5 (legal expert Lori Andrews notes that doctors have reported disputes between IVF participants over the disposition of preembryos arising in various states).

8. See, e.g., Findlay, Gregg, Impoco, Lief, Gest, Work, Taylor, Allman, Burroughs & Viney, *The Trial of an Embryonic Issue*, U.S. NEWS & WORLD REP., Aug. 21, 1989, at 13; Sanders, *Whose Lives Are These?*, TIME, Oct. 2, 1989, at 19.

9. No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990).

10. Once the *Davis* case reached the appellate level, Mary Sue Davis no longer sought implantation. Instead, she argued for the right to have the preembryos donated to another infertile couple. No. 180, 1990 Tenn. App. LEXIS 642, at 1 n.1. In a bizarre twist, Junior Davis has recently married a woman who is incapable of having children and has indicated an interest in hiring a surrogate mother and having at least one of the frozen embryos implanted. See Curriden, *Joint Custody of the Frozen Seven*, A.B.A. J., Dec. 1990, at 36, 36 (the Davises have "revised, if not reversed, their original positions.").

were reversed and the husband favored implantation against the wife's wishes.

Part I of this note explains the need for IVF and describes the IVF process.¹¹ Part I also discusses the facts and arguments presented in the *Davis* case.¹² Part II analyzes the preembryo's legal status, presenting alternative arguments that the preembryo should be characterized as property, human life, or as something else.¹³ Part III examines the procreative rights and interests of the spouses. It outlines the constitutional arguments available to each spouse¹⁴ and evaluates two possible approaches to resolving spousal disputes over frozen preembryos.¹⁵ Part III also explains how the choice of legal status accorded the preembryo affects the validity of the approach chosen to resolve the dispute.¹⁶

This note concludes that preembryos are neither property nor human life, but instead possess a unique status deserving special respect.¹⁷ For this reason, the outcome of a dispute between spouses over their preembryos should be governed neither by property law nor by granting preembryos legal rights. Instead, the outcome should respect the special status of the preembryo in a manner that maximizes fairness and minimizes harm to each spouse's interests. The most appropriate outcome is to allow the spouse favoring implantation to prevail, on condition of that spouse's acceptance of sole legal responsibility for any resulting child.

I. BACKGROUND

A. Infertility

Since the 1978 birth in England of Louise Brown, the first child conceived through the extracorporeal fertilization of a human egg,¹⁸ IVF has spread rapidly throughout the United States, Canada, Europe, and Australia.¹⁹ To date there are more than 220 IVF programs in the United States alone.²⁰

11. See *infra* text accompanying notes 18-46.

12. See *infra* text accompanying notes 47-80.

13. See *infra* text accompanying notes 81-173.

14. See *infra* text accompanying notes 174-208.

15. See *infra* text accompanying notes 209-23.

16. See *infra* text accompanying notes 224-29.

17. See *infra* pp. 578-79.

18. Robertson, *supra* note 2, at 942-43.

19. *Id.* at 943.

20. *Consumer Protection Issues Involving In Vitro Fertilization Clinics: Hearing Before the Subcomm. on Regulation, Business Opportunities, and Energy of the House*

Efforts to expand IVF largely result from the growing number of infertile couples who are desperate to conceive.²¹ This increase in infertility over the last several years can be attributed to numerous factors, including changes in sexual behavior and the increasing age at which women marry and have children.²² A recent report by the American Fertility Society shows that 2.4 million American couples fail to achieve pregnancy within the first year of trying.²³ These couples often find the inability to bear children to be a great and powerful loss, causing "isolation, guilt, marital strife, and intense assaults on feelings of self-worth."²⁴

Until the recent rise in recognition and treatment of infertility, this non-life-threatening and supposedly incurable problem received little attention,²⁵ leaving those afflicted to suffer in silence. It was no wonder that when the first IVF center in the United States opened in 1981, 3,000 people signed up immediately, despite a reported success rate of only two percent.²⁶

B. The IVF Process

In vitro fertilization is a procedure used primarily to treat women with tubal disease and men with a low sperm count.²⁷ The IVF process duplicates in a laboratory the fertilization and development of a preembryo within the fallopian tube.²⁸ The first step

Comm. on Small Business, 101st Cong., 1st Sess. 1 (1989) [hereinafter *In Vitro Hearings*] (statement of Rep. Ron Wyden, subcommittee chairman).

21. See Robertson, *supra* note 2, at 945 ("[I]nfertility is now appearing with greater frequency among large numbers of white, educated, middle and upper income women in their twenties and thirties."); see also A. BONNICKSEN, *IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES* 23-24 (1989) (discussing the advantages of IVF over other alternatives available to infertile couples).

22. Robertson, *supra* note 2, at 945.

23. AM. FERTILITY SOC'Y, *INFERTILITY: AN OVERVIEW* 3 (1988), reprinted in *In Vitro Hearings*, *supra* note 20, at 76.

24. Robertson, *supra* note 2, at 945. Robertson continues:

The inability to beget, bear, and rear children is a great loss for many infertile men and women. Infertility often implicates the most fundamental feelings about self and one's relation to the natural order, and may leave persons feeling handicapped or defective in an area central to personal identity and fulfillment.

Id. (footnote omitted).

25. See A. BONNICKSEN, *supra* note 21, at 19 (attributing the past lack of attention to infertility problems to modern medicine's emphasis on finding permanent cures for disease instead of pursuing ongoing circumvention of a chronic condition).

26. *Id.* at 24.

27. See Dickey, *The Medical Status of the Embryo*, 32 LOY. L. REV. 317, 318-19 (1986) (discussing causes of infertility and candidacy for IVF programs).

28. *Id.* at 324.

of IVF involves stimulating the release of multiple eggs from the ovaries of a pre-menopausal woman through fertility medications; harvesting several eggs at once increases the likelihood that only one surgical procedure for egg removal will be required.²⁹ The next step involves removal of the eggs by either laparoscopy or ultrasound-directed needle aspiration.³⁰ Once retrieved, the eggs are placed "into a fluid similar to that found in the fallopian tube."³¹ The timing of this removal is very important "because an egg will not develop properly if it is collected too early."³²

Following the egg's maturation in the fluid, sperm cells previously collected from the husband are introduced to it.³³ One sperm cell will fertilize the egg to form a zygote, which will then develop by cell division until reaching a stage between two and eight cells.³⁴ Because implantation has not occurred and advanced cell differentiation has not yet begun, this developing multicellular entity may at this stage be termed a "preembryo."³⁵ When the developing preembryo reaches the four- or eight-cell stage, it is normally implanted in the woman's uterus by a cervical catheter.³⁶ The hope is that in approximately one week, the preembryo will attach to the uterine wall, continue to grow, and develop into a fetus.³⁷

Because most cases require several attempts at implantation to achieve a successful pregnancy, the technique of cryopreservation, or freezing and storing of newly fertilized eggs, has become an integral part of many IVF programs.³⁸ Cryopreservation is

29. *Id.*

30. *Id.* at 326. Laparoscopy requires administration of a mild general anesthetic, while ultrasound-directed needle aspiration is performed under a local anesthetic. R. MARRS IN VITRO FERTILIZATION AND EMBRYO REPLACEMENT 6 (1989), reprinted in *In Vitro Hearings*, *supra* note 20, at 99. Some physicians claim, however, that this latter method may not produce as many eggs. Dickey, *supra* note 27, at 326.

31. Dickey, *supra* note 27, at 326.

32. McCartan, *A Survey of the Legal, Ethical, and Public Policy Considerations of In Vitro Fertilization*, 2 NOTRE DAME J.L., ETHICS, & PUB. POL. 695, 696 (1986).

33. Dickey, *supra* note 27, at 326.

34. *Id.*

35. A preembryo, as distinguished from an embryo, is a fertilized egg that has not yet implanted itself into the uterine wall. See *Davis v. Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990) (summarizing expert testimony offered at trial). For a complete discussion of the validity of this distinction, see *infra* text accompanying notes 114-29.

36. Dickey, *supra* note 27, at 326.

37. See generally McCartan, *supra* note 32, at 697 (describing the implantation process and the subsequent development of the embryo within the uterus).

38. Sillman, *In Vitro Fertilization and Cryopreservation*, 67 MICH. B.J. 601 (1988).

beneficial³⁹ because it allows a woman to undergo multiple implantations without having to endure several surgical procedures to extract eggs.⁴⁰ Cryopreservation thus reduces the overall cost of IVF,⁴¹ raises the rate of pregnancy,⁴² and enables a woman to receive the preembryos for implantation when she is physically and emotionally best prepared.⁴³ Fertilized eggs have been frozen for up to twenty-eight months and then implanted successfully, resulting in live births.⁴⁴ It is estimated that as of 1988, at least sixty children worldwide were born from frozen preembryos.⁴⁵

The major disadvantage of cryopreservation lies in the unforeseen circumstances that may arise after the preembryos have been cryopreserved, but before they have been implanted. Death, divorce, separation, a change of heart, or a natural pregnancy may make future implantation impossible or undesirable for one or both spouses. Many IVF clinics require participants to sign consent forms at the outset that stipulate what to do with the preembryos should any of these events occur.⁴⁶ In cases where forms were not signed or were not sufficiently explicit, however, disagreements over the disposition of the preembryos have led to legal battles.

39. *But cf.* Bonnicksen, *Embryo Freezing: Ethical Issues in the Clinical Setting*, HASTINGS CENTER REP., Dec. 1988, at 26, 26-27 (noting that the benefits of cryopreservation have not yet been sufficiently proven and that potential emotional repercussions, including abnormal emotional bonding to the frozen preembryos, may actually cause harm to IVF participants).

40. *Id.* at 26. This is of even greater benefit to women who anticipate loss of or damage to their ovaries, or who may be unable to undergo more than one laparoscopy. Note, *supra* note 5, at 1084.

41. *Id.* (avoiding repeated start-up costs as well as decreasing time lost from work provides financial savings).

42. The chances for pregnancy increase because the embryo can be implanted after the woman is completely free from the effects of the hormonal stimulation and anesthesia used during laparoscopy. Sillman, *supra* note 38, at 602; Note, *supra* note 5, at 1084.

43. See Sillman, *supra* note 38, at 601 (cryogenically preserved fertilized eggs can be saved for later implantation if a woman is presently ill, incapacitated, or otherwise unavailable).

44. Sherman, *Just Whose Embryo Is It, Anyway? Couple Suing to 'Rescue its Genetic Material*, NAT'L L.J., June 12, 1989, at 1, col. 2.

45. Bonnicksen, *supra* note 39, at 26.

46. Curriden, *Frozen Embryos: The New Frontier*, A.B.A. J., Aug. 1989, at 68, 71; see Goodman, *The Fate of Biological Mergers*, Boston Globe, Mar. 9, 1989, at 15, col. 5 (suggesting that frozen embryo disposition agreements include "pre-conceptual clauses" that specify whether the husband or wife controls the fate of the preembryos in case of disagreement).

C. The *Davis* Controversy

The most publicized case involving a dispute between spouses over frozen preembryos is *Davis v Davis*.⁴⁷ The Davis controversy arose when Junior and Mary Sue Davis,⁴⁸ longtime IVF participants, decided to divorce. Before that time, Mary Sue Davis had "suffered significant trauma and pain" in her attempts to bear a child through natural means.⁴⁹ After five ectopic pregnancies,⁵⁰ one of her fallopian tubes ruptured, nearly causing her death.⁵¹ To avoid future problems, Mary Sue Davis "undertook surgical treatment which rendered her incapable of natural conception."⁵²

Despite this setback, the Davises decided to pursue alternative means of beginning a family. They first attempted six preembryo implantations through separate IVF procedures.⁵³ After all six procedures failed, the Davises attempted to adopt a child; this effort was also unsuccessful.⁵⁴ Finally, in 1988, the Davises heard about cryopreservation and Mary Sue Davis underwent another IVF procedure. Two preembryos were implanted unsuccessfully and seven more were frozen for later implantation.⁵⁵ These seven frozen preembryos, stored at the Fertility Center of East Tennessee in Knoxville,⁵⁶ became the subject of controversy between the Davises.

In 1989, following Mary Sue and Junior Davis's decision to divorce, each spouse fought for the right to control the fate of the frozen preembryos. Mary Sue Davis believed that the preembryos represented her best, and possibly last, chance to bear a child. She asserted the right to have them implanted, regardless of whether the court viewed the preembryos as property or human life. If the

47. No. E-14496, 1989 Tenn. App. LEXIS 641 (Tenn. Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Tenn. Ct. App. Sept. 13, 1990).

48. Mary Sue Davis has since remarried and changed her name to Mary Sue Stowe. *Davis*, No. 180, 1990 Tenn. App. LEXIS 642, at 1. For the sake of clarity and consistency, however, this note refers to her as Mary Sue Davis.

49. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 4.

50. In an ectopic pregnancy, gestation occurs in the fallopian tube or peritoneal cavity instead of in the uterus. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 395 (1984).

51. Curriden, *supra* note 46, at 68.

52. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 4. Specifically, Mary Sue Davis's remaining fallopian tube was ligated. Curriden, *supra* note 46, at 68.

53. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 5. The couple spent nearly \$50,000 on these unsuccessful implantation attempts. Curriden, *supra* note 46, at 68.

54. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 5.

55. *Id.* at 7-8.

56. *Davis*, No. 180, 1990 Tenn. App. LEXIS 642, at 1.

court viewed the preembryos as property, the outcome of the case would depend on the application of the state's equitable distribution of property statute.⁵⁷ Having undergone far more physical pain than her husband in creating the preembryos, Mary Sue Davis contributed more to their "acquisition" and therefore had a greater equitable interest in the "property."⁵⁸ If the court instead viewed the preembryos as human life, the outcome of the case would depend on the best interests of the "child," as required by the state's custody statute.⁵⁹ Since the interests of the "children" would be best served by allowing them to come into existence, implantation would be warranted.⁶⁰

Mary Sue Davis also asserted a constitutionally protected "right to generate a child,"⁶¹ whether the child was conceived naturally or artificially.⁶² She maintained that Junior Davis's constitutional right not to procreate was waived as of the time he consented to fertilization and to at least one implantation.⁶³

Junior Davis was vehemently opposed to implantation of the preembryos. His preference was to have them remain in their frozen state, which was, in effect, a request for their destruction.⁶⁴

57. TENN. CODE ANN. § 36-4-121 (Supp. 1989). The statute reads in pertinent part: "In making equitable division of marital property, the court shall consider all relevant factors including: (5) The contribution of each party to the acquisition, preservation, appreciation or dissipation of the marital or separate property." *Id.*

58. See Defendant and Counter-Plaintiff's Brief at 14, *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990) [hereinafter Defendant's Brief] (arguing that the woman's contribution, as measured by physical pain, is normally much greater).

59. The statute reads in pertinent part:

In a suit for divorce where the custody of a minor child or minor children is a question, the court may award the care, custody, and control of such child or children to [either, both, or neither parents] as the welfare and interest of the child or children may demand

TENN. CODE ANN. § 36-6-101 (Supp. 1989).

60. See generally Defendant's Supplemental Brief at 1, *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (stating that the Supreme Court's decision in *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989), supports a finding that human life begins at conception and therefore tips the scales in favor of applying § 36-6-101 in this case).

61. Defendants' Brief, *supra* note 58, at 9 (quoting Krental, "Ownership" of the Fertilized Ovum in Vitro: A Hypothetical Case in Louisiana, 32 LA. B.J. 284, 286 (1985)).

62. *Id.* at 10. For authority supporting a constitutional right to reproduction by artificial means, see *infra* text accompanying notes 177-82.

63. See Defendant's Brief, *supra* note 58, at 14-15 ("[T]here have been no laws implemented since Adam and Eve or in recorded history that have given the man the legal or moral right to withdraw his consent once he has fertilized his mate.").

64. "[T]he undisputed, uncontroverted testimony is that to allow the parties [sic] seven cryogenically [sic] preserved human embryos to remain so preserved for a period

Junior Davis did not respond to his wife's argument that if the preembryos were property, it would be more equitable to distribute them to her.⁶⁵ Instead, he focused on the issue of whether the preembryos were persons, arguing that preembryos are not persons, do not possess any independent legal rights, and should not be defined as children or made subject to custody law.⁶⁶ As to constitutionally protected rights concerning procreation, Junior Davis argued that the court must recognize the rights of both spouses to control their reproductive processes.⁶⁷ Finding in favor of Mary Sue Davis would remove this control, forcing Junior Davis to father a child against his will. Ruling in Junior Davis's favor, however, would merely require Mary Sue to have a child by other means.⁶⁸

At the trial level, Judge Dale Young awarded temporary custody of the seven preembryos to Mary Sue Davis for the purpose of implantation.⁶⁹ This award was based on his finding that human life begins at conception, and that the best interests of the "child or children in vitro" would be served by allowing their implantation.⁷⁰ Judge Young relied heavily on the expert opinion of Dr. Jerome Lejeune, who testified that "a man is a man; that upon fertilization, the entire constitution of the man is clearly, unequivocally spelled-out, including arms, legs, nervous systems and the like; that upon inspection via DNA manipulation, one can see the life codes for each of these otherwise unobservable elements of the unique individual."⁷¹ The court concluded that the Davises had already accomplished their original intent to produce children,⁷² and implantation would afford the only hope for their

exceeding two years is tantamount to [their] destruction " *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 36; see Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437, 467 n.75 (1990) ("indefinite storage becomes a euphemism for nontransfer or discard").

65. See generally Plaintiff's Brief, *Davis*, No. E-14496, Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990) (discussing only the issue of whether preembryos are persons and not how to distribute them if classified as property).

66. *Id.* at 1.

67. *Id.* at 3.

68. *Id.* at 5 (quoting a draft version of Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CENTER REP., Nov./Dec. 1989, at 7).

69. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 2.

70. *Id.*

71. *Id.* at 27.

72. *Id.* at 30.

survival.⁷³

On appeal, the decision of the trial court was reversed and remanded.⁷⁴ The appellate court held that neither Tennessee law nor the United States Constitution, under *Roe v. Wade*,⁷⁵ grants fetuses the legal status of persons.⁷⁶ Rather, the Tennessee statutory scheme "indicates that as embryos develop, they are accorded more respect than mere human cells because of their burgeoning potential for life."⁷⁷ The court also held that Junior Davis has a "constitutionally protected right not to beget a child where no pregnancy has taken place."⁷⁸ The court stated, "it would be repugnant and offensive to constitutional principles to order Mary Sue to implant these fertilized ova against her will. It would be equally repugnant to order Junior to bear the psychological, if not the legal, consequences of paternity against his will."⁷⁹ To resolve the dispute, the court granted Mary Sue and Junior Davis a joint interest in the preembryos, with equal control over their disposition.⁸⁰

The result reached by the *Davis* appellate court is troublesome for two reasons. First, the court's grant to each spouse of "equal control" over the preembryos has little meaning in light of its recognition of each spouse's constitutional right not to have the preembryos implanted. In effect, the spouse opposing implantation exercises determinative control over the preembryos. Second, the court's ruling delegates the decision to the spouses, who would not be in court but for their inability to resolve the issue jointly.

It is possible to formulate a better rule, one that is fair to both spouses yet less disappointing to the spouse who loses the dispute. To better resolve the type of controversy presented in *Davis*, two central issues must be addressed: the legal status of the preembryo and the spouse's reproductive rights in this context. These issues are examined below.

73. *Id.* at 37.

74. *Davis*, No. 180, 1990 Tenn. App. LEXIS 642, at 8-9.

75. 410 U.S. 113 (1973).

76. *Davis*, No. 180, 1990 Tenn. App. LEXIS 642, at 7.

77. *Id.* at 8 (observing that Tennessee statutes incorporate the trimester approach to identifying viable human life as outlined in *Roe*).

78. *Id.* at 5.

79. *Id.* at 9.

80. *Id.*

II. THE STATUS OF THE PREEMBRYO

Scholars in the field of medical ethics have advocated three distinct positions with regard to the preembryo's legal status. Some categorize preembryos as property and argue that, in a divorce proceeding, preembryos should be subject to state laws governing the equitable distribution of marital property.⁸¹ Others believe that life begins at the moment of conception and that, as human life, preembryos must be implanted as a matter of constitutional right.⁸² A third group accords the preembryo a unique status as potential life, deserving of special care and respect but no legal protection.⁸³ Under this last theory, other considerations may govern the decision whether to implant or destroy preembryos.

A. The Preembryo as Property

Some groups and commentators advocate classification of preembryos as property.⁸⁴ For instance, the American Fertility Society ("AFS") has published an ethical statement that "gametes and concepti [preembryos] are the property of the donors,"⁸⁵ and "the donors therefore have the right to decide at their sole discretion the disposition of these items."⁸⁶

In making this statement, the AFS seemed to recognize the interest of IVF participants in controlling the usage of their genetic material. This interest is analogous to that which a patient may have in the disposition of removed organs. Examination of such a case will illuminate the contention that preembryos should be given the status of property.

In *Moore v Regents of University of California*,⁸⁷ the plaintiff had his diseased spleen removed as part of his treatment for leukemia. Following this procedure, the plaintiff's doctor discov-

81. See *infra* text accompanying notes 84-100.

82. See *infra* text accompanying notes 101-49.

83. See *infra* text accompanying notes 150-173.

84. See, e.g., Andrews, *The Legal Status of the Embryo*, 32 LOY. L. REV. 357, 366 n.47 (1986) (citing Andrews, *My Body, My Property*, HASTINGS CENTER REP., Feb. 1986, at 28; Jansen, *Sperm and Ova as Property*, 11 J. MED. ETHICS 123 (1985)) (giving examples of groups and individuals who hold such views).

85. American Fertility Society, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY 12 (1984).

86. *Id.*

87. 215 Cal. App. 3d 709, 249 Cal. Rptr. 494 (1988), *rev'd*, 51 Cal. 3d 120, 793 P.2d 479, 271 Cal. Rptr. 146 (1990).

ered that the removed spleen contained unique cells. The doctor modified the spleen cells through genetic engineering to create valuable pharmaceutical products, without the plaintiff's knowledge or consent. When the plaintiff discovered his doctor's actions, he sued the doctor for conversion of personal property⁸⁸

The California appellate court in *Moore* agreed with the plaintiff that the interest in one's own genetic material or body parts is sufficient to be considered a property interest.⁸⁹ The appellate court held that there is no legal authority, public policy, or biological fact that compels a contrary result.⁹⁰

The California Supreme Court, however, held that property law is not the appropriate means of assessing a person's interest in excised cells or other biological parts.⁹¹ The court maintained that "one may earnestly wish to protect privacy and dignity [by controlling one's body and body parts] without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property."⁹²

The *Moore* court's finding that individuals have no property rights in their biological parts applies a fortiori to individuals claiming property rights in preembryos produced from their genetic material. While the spleen cells in *Moore* merely became pharmaceutical products, preembryos have the potential to become viable fetuses and newborn infants. Because of their potential to become human beings, preembryos have a status that should under no circumstances be considered property.

This view is consistent with the post-slavery policy in the United States against recognizing property interests in human beings.⁹³ While the law has recognized parents' rights to control their children,⁹⁴ it no longer goes so far as to call offspring the

88. *Id.* at 715, 249 Cal. Rptr. at 498.

89. *Id.* at 723-25, 249 Cal. Rptr. at 503-05 (noting that the statutory listing of personal property items is not exhaustive and that plaintiff demonstrated sufficient use, control, and disposition over his spleen cells to classify them as personal property).

90. *Id.* at 723, 249 Cal. Rptr. at 503.

91. *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 138, 793 P.2d 479, 489, 271 Cal. Rptr. 146, 157 (1990).

92. *Id.* at 140, 793 P.2d at 491, 271 Cal. Rptr. at 158.

93. See U.S. CONST. amend. XIII, § 1; see also Dickens, *The Ectogenetic Human Being: A Problem Child of Our Time*, 18 W. ONT. L. REV. 241, 245 (1980) ("At no point on the evolutionary progression do property interests clearly attach to human persons under modern, post-slavery law."); cf. Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142 (1977) (discussing property rights in body parts and materials taken from the body of a living person).

94. See, e.g., *Turner v. Turner*, 167 Cal. App. 2d 636, 642, 334 P.2d 1011, 1015

property of their parents.⁹⁵

Finally, the position against treating preembryos as property has been accepted by experts worldwide⁹⁶ as well as by politicians⁹⁷ and juries⁹⁸ in the United States. It was also adopted by prestigious bioethics committees in England and Australia.⁹⁹

While it may be proper to grant IVF participants decision-making power over the future of the preembryos they create, this right should not be mistaken for a property interest. Such a right should be considered exactly what it is: control over decisions regarding a potential life emanating from one's genetic material. To call it property "comes up to the threshold of assaulting the value of a potential person."¹⁰⁰

B. The Preembryo as Human Being

Several well-known groups support the position that preembryos should be granted the rights and protections accorded to persons under the law because life begins at conception. This view is held by the Roman Catholic Church and by members of "right-

(1959) ("The parent has authority to control the child, and to administer restraint and punishment, in order to compel obedience to reasonable and necessary directions.").

95. See generally M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 234-42 (1985) (discussing the gradual shift in child custody law from a property-based standard, automatically giving the male custody, to a "best interests of the child" standard).

96. See, e.g., G. COREA, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* 130 (1986).

97. See, e.g., Defendant's Brief, *supra* note 58, at 14 (quoting *Human Embryo Transfer: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 98th Cong., 2d Sess. 232 (1984) (statement of Senator Albert Gore, Jr.) ("I disagree that there's just a sliding scale of continuum with property at one point along the spectrum and human beings at another. I think that there's a sharp distinction between something that is property and something that is not property.")).

98. See, e.g., *Del Zio v. Presbyterian Hosp.*, No. 74 Civ. 3588, slip op. at 6 (S.D.N.Y. Nov. 14, 1978) (jury found that defendants did not convert property when they destroyed a test tube containing ova and sperm for in vitro fertilization).

99. See Andrews, *supra* note 84, at 366-67. The Warnock Committee in England proposed legislation that would "ensure there is no right of ownership in a human embryo." *Id.* (quoting M. WARNOCK, *A QUESTION OF LIFE: THE WARNOCK REPORT ON HUMAN FERTILIZATION AND EMBRYOLOGY* para. 10.11 (1985)). Likewise, the Waller Committee in Victoria, Australia, stated that it "does not regard the couple whose embryo is stored as owning or having dominion over the embryo." *Id.* at 367 (quoting COMMITTEE TO CONSIDER THE SOCIAL, ETHICAL AND LEGAL ISSUES ARISING FROM IN VITRO FERTILIZATION, *REPORT ON THE DISPOSITION OF EMBRYOS PRODUCED BY IN VITRO FERTILIZATION* § 2.8 (1984) (statement of Louis Waller, chairman)).

100. Curriden, *supra* note 46, at 70 (quoting Dr. John Fletcher, professor of medical ethics at the University of Virginia School of Medicine).

to-life" groups.¹⁰¹ It also has been adopted by a few state legislatures. For example, under Louisiana law, preembryos are juridical persons that cannot be destroyed or owned.¹⁰² Louisiana law may even mandate donation of preembryos to other couples if donation would be in the preembryos' best interests.¹⁰³ The constitutionality of this law has not yet been considered by any court.¹⁰⁴

Missouri has also enacted a law stating that "[t]he life of each human being begins at conception,"¹⁰⁵ and that "[u]nborn children have protectable interests in life, health, and well-being."¹⁰⁶ In the highly publicized case of *Webster v Reproductive Health Services*,¹⁰⁷ which arose from a challenge to the Missouri abortion laws, the Court declined to pass on the constitutionality of this language, finding that the wording did not itself regulate abortions.¹⁰⁸ Unlike Louisiana or Missouri, however, Tennessee had no statute declaring the point at which life begins. The courts deciding the *Davis* case were left to decide whether a preembryo should be given the status of human being.

1. The *Davis* Trial Court Approach

At the trial level in *Davis v Davis*,¹⁰⁹ Judge Young aligned Tennessee with Louisiana and Missouri, holding that preembryos are human beings.¹¹⁰ The court's ruling was based on its resolution of three relevant issues in the case.

First, the court took the position that the 1986 guidelines for IVF established by the Ethics Committee of the American Fertility Society were not binding upon the court.¹¹¹ This finding was necessary to the *Davis* holding because the AFS has maintained

101. Robertson, *supra* note 2, at 971; Note, *supra* note 5, at 1090.

102. See LA. REV. STAT. ANN. §§ 9:126, 9:129, 9:130 (West Supp. 1989) (setting forth details of ownership, destruction, and legal status of fertilized ova produced by IVF).

103. See *id.* §§ 9:125, 9:130, 9:131 (setting forth regulations for status of preembryos and conditions for donation).

104. Defendant's Brief, *supra* note 58, at 7.

105. MO. REV. STAT. § 1.205.1(1) (1986).

106. *Id.* § 1.205.1(2).

107. 109 S. Ct. 3040 (1989).

108. *Id.* at 3050.

109. No. E-14496, 1989 Tenn. App. LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev d.*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990). For a discussion of the facts and the parties' arguments involved in *Davis*, see *supra* text accompanying notes 47-80.

110. See *id.* at 2 (finding that "[h]uman life begins at conception" and therefore "Mr. and Mrs. Davis have produced [seven] human beings").

111. *Id.* at 1.

that preembryos are not legal persons.¹¹² Judge Young held that while the guidelines published by the AFS set the standard for professionals in the field of fertility treatment, they do not have the "force and effect of the law" and may be accepted or rejected at the court's discretion.¹¹³

Second, the *Davis* trial court found that no distinction exists between a preembryo and an embryo.¹¹⁴ The court maintained this position despite extensive expert testimony of the distinction's validity.¹¹⁵ Three of the four IVF experts who testified agreed that a preembryo is the entity that exists after an egg is fertilized but before it naturally implants in the uterine wall and begins to develop organs, body parts, and differentiated cells.¹¹⁶ In a natural pregnancy, this preembryonic stage lasts up to approximately fourteen days after fertilization; upon implantation, an embryo begins to take form.¹¹⁷

In disagreeing with three of the four experts, the court also disagreed with the view of the American Fertility Society. The AFS adopts the view that a preembryo is distinct from an embryo.¹¹⁸ The AFS explains that the preembryonic stage involves the development of the embryo's trophoblast, or feeding layer, rather than development of the embryo itself. The feeding layer must be formed before the embryo can develop.¹¹⁹ Prior to implantation in the uterus, the preembryo is so undeveloped that twinning may still occur.¹²⁰

112. See Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY 30S (Supp. 1 1986) ("the law does not recognize the preembryo itself as a legal subject").

113. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 20.

114. *Id.* at 1.

115. See *id.* at 13-14 (synopsis of the testimony given by expert witnesses Dr. Irving R. King, Dr. Charles A. Shivers, and Professor John A. Robertson).

116. *Id.*

117. *Id.* See generally Robertson, *supra* note 64, at 441-44 (discussing the biological status of early embryos and stating that the embryonic axis, from which the major organs and structures differentiate, does not form until the second postfertilization week).

118. See Ethics Committee of the American Fertility Society, *supra* note 112, at 27S ("[T]he status of the preembryo should be different from that of the still later embryonic stages.")

119. See *id.* ("[E]arly events in mammalian development, very likely including the human, involve formation of extraembryonic, rather than embryonic, structures and functions."); Robertson, *supra* note 64, at 442 ("The outer cells develop into a trophoblastic or feeding layer that becomes the extra-embryonic placenta, rather than the embryo proper.")

120. See Robertson, *supra* note 64, at 445 n.28 ("[U]ntil implantation and the formation of the embryonic axis occurs, it is not yet certain that a biological individual exists,

Supporters of this definitional distinction maintain that preembryos are biologically far too primitive to deserve the legal status of personhood.¹²¹ While preembryos may deserve moral recognition for their potential to become persons, there is no reason to accord them the rights of a born human being.¹²² Because transfer or cryopreservation of fertilized eggs takes place during the preembryonic stage,¹²³ advocates of the preembryo-embryo distinction maintain that there is no imperative for implantation in the woman based on a legal right to life.¹²⁴

Despite the substantial testimony in support of this view, Judge Young took the position that there is no basis for a distinction between embryos and preembryos.¹²⁵ The court stated that it could not find reference to the term "preembryo" in any encyclopedia or dictionary, and that the term had arisen primarily because the AFS chose it "to avoid confusion for the purposes of its own guidelines."¹²⁶ In taking this view, the judge accepted the expert testimony of Dr. Jerome Lejeune, a genetics specialist.¹²⁷ Dr. Lejeune testified that there is no need to classify preembryos separately because nothing exists before the embryo except an egg and a sperm.¹²⁸ In support of his opinion, Dr. Lejeune cited the definition of embryo from a fifty-year-old dictionary "that youngest form of a being."¹²⁹ The court's rejection of the preembryo-embryo distinction removed what it considered an artificial barrier to finding that a cryopreserved fertilized egg is human life.

The third basis for the court's decision was its finding that

as natural twinning that produces two individuals may occur." (citing Jones & Schrader, *And Just What Is a Pre-Embryo?*, 52 FERTILITY & STERILITY 189, 190 (1989)).

121. See, e.g., *id.* at 445 ("[T]he fertilized egg and early embryo consist of undifferentiated cells [and] cannot seriously be considered a person or even a rights-bearing entity." (footnote omitted)).

122. See, e.g., *Ethics Committee of the American Fertility Society*, *supra* note 112, at 30S. See generally Robertson, *supra* note 2, at 974 (discussing the various views on the moral and legal status of extracorporeal preembryos).

123. See Robertson, *supra* note 64, at 443 ("In IVF programs the embryo will be transferred to a uterus when it reaches the four-, six-, or eight-cell stage, some forty-eight to seventy-two hours after conception. It is also at this stage that the embryo would be cryopreserved for later use " (footnote omitted)).

124. See Robertson, *supra* note 2, at 967 (arguing that noncoital reproduction should be left to the discretion of the patients and their doctors, without public sector interference).

125. *Davis*, No. E-14496, 1989 Tenn. App. LEXIS 641, at 1.

126. *Id.* at 20-21.

127. *Id.* at 27. For the court's summary of Dr. Lejeune's testimony, see *id.* at 76-84.

128. *Id.* at 79.

129. *Id.*

the cells comprising cryopreserved fertilized eggs are "unique in character and specialized to the highest degree of distinction."¹³⁰ Here the court again relied upon Dr. Lejeune's testimony. Dr. Lejeune offered scientific evidence to prove human cell uniqueness at the earliest stages of development¹³¹ and testified that "it is now an experimentally-demonstrated fact that at the three-cell stage, every individual is uniquely different from any other individual and the probability that the genetic information found in one cell would be identical to another person is less than one in one billion."¹³²

On the basis of these positions — that the AFS guidelines were not binding upon the court, that an embryo is created at the moment an egg is fertilized, and that each embryo is genetically unique from all others — the *Davis* court concluded that human beings are created at the moment of conception.¹³³ The court went so far as to call these frozen fertilized eggs "children, in vitro"¹³⁴ and ruled that, as such, their future should be determined by the "best interest of the children" standard.¹³⁵ The court subsequently concluded that implantation would be in the "children's" best interest.¹³⁶

2. Where the Trial Court Went Wrong

The most significant misconception of the trial-level *Davis* decision lies in the court's mistaken impression that deciding when human life begins is dispositive of when an entity should be granted legal status. Assuming the accuracy of Dr. Lejeune's testimony, it merely proves that a unique human life begins to develop shortly after fertilization. This medical conclusion does not, in and of itself, provide a framework for deciding what this developing entity's legal status should be. To make such a determination, one must examine more than biological data. Consideration must be given to how the law treats embryonic human life-forms. Judge Young neglected to take this important step.

The still prevailing legal view, expressed by the Supreme

130. *Id.* at 27.

131. *See id.* at 81-82 (discussing the uniqueness of the DNA "instructions" contained in the original fertilized egg even before it splits into multiple cells).

132. *Id.* at 80.

133. *Id.* at 30.

134. *Id.* at 2.

135. *Id.* at 37.

136. *Id.*

Court of the United States in *Roe v. Wade*,¹³⁷ is that the word "person" as used in the Constitution has no prenatal application.¹³⁸ This means that fetuses, and a fortiori preembryos, are not persons under the fourteenth amendment and are not entitled to equal protection or due process guarantees.¹³⁹ In *Webster v. Reproductive Health Services*,¹⁴⁰ Justice Stevens observed that "[n]o Member of this Court has ever questioned the holding in *Roe* that a fetus is not a 'person' within the meaning of the Fourteenth Amendment."¹⁴¹

A sampling of state laws also indicates broad support for the position that preembryos are not legal persons. Most states do not impose criminal sanctions for the destruction of preembryos, nor are doctors generally required to implant all the fertilized eggs of IVF participants.¹⁴² Use of intrauterine birth control devices, which destroy preembryos at the same stage of development as those cryopreserved for IVF,¹⁴³ is legal.¹⁴⁴ These examples demonstrate that states recognize that a preembryo is not a "person."

3. The *Davis* Appellate Court Approach

In reversing the trial court's decision, the *Davis* appellate court focused on identifying the legal status of preembryos rather than determining when human life begins.¹⁴⁵ The court noted that Tennessee had statutorily adopted the trimester approach outlined in *Roe v. Wade*,¹⁴⁶ which "indicates that as embryos develop, they

137. 410 U.S. 113 (1973).

138. *Id.* at 157-58; see Andrews, *supra* note 84, at 368 (detailing the Supreme Court's rejection of any prenatal application of the word "person" in the Constitution).

139. See *Roe*, 410 U.S. at 157 (declining to categorize a fetus as a "person," as that term is used within the due process and equal protection clauses of the fourteenth amendment).

140. 109 S. Ct. 3040 (1989).

141. *Id.* at 3083 n.13.

142. Defendant's Brief, *supra* note 58, at 13. But see *supra* text accompanying note 102-03.

143. See F CUNNINGHAM, P MACDONALD, & N. GANT, WILLIAMS OBSTETRICS 931 (18th ed. 1989) (this device's most prominent contraceptive action is its "[i]nterference with successful implantation of the fertilized ovum in the endometrium").

144. See *Webster*, 109 S. Ct. at 3081 (Stevens, J., concurring and dissenting) (noting that the intrauterine device is a commonly used form of contraception).

145. See *Davis v. Davis*, No. 180, 1990 Tenn. App. LEXIS at 7 (Ct. App. Sept. 13, 1990) (finding that embryos "are not given legal status equivalent to that of a person" in accordance with federal constitutional law under *Roe*, Tennessee Statutory law, and Tennessee common law).

146. 410 U.S. 113 (1973).

are accorded more respect than mere human cells because of their burgeoning potential for life. But, even after viability, they are not given legal status equivalent to that of a person already born."¹⁴⁷ Furthermore, the appellate court noted that, in cases interpreting the state wrongful death statute, the Tennessee Supreme Court held that even a viable fetus is not a person unless born alive.¹⁴⁸ Because the appellate court properly focused on the rights accorded to preembryos instead of on when life begins, it reversed the trial court and remanded with instructions to vest "Mary Sue and Junior with joint control of the fertilized ova and with equal voice over their disposition."¹⁴⁹

C. The Special Status of the Preembryo

In deciding the status of the preembryo, the *Davis* trial judge restricted his inquiry to a determination of whether the preembryos were persons or property. On appeal, the court instead seemed to adopt the position taken by most American scholars in the field and by national commissions on IVF worldwide:¹⁵⁰ that the preembryos have a separate, special status.¹⁵¹

This third view holds that because preembryos are living, human entities and have the potential to become human beings, they deserve moral recognition and special respect.¹⁵² As such, preembryos should be treated differently than other human tissue but should not be granted the legal rights accorded to persons.¹⁵³ The special status view allows for flexibility in choosing what measures are appropriate to reflect this respect in the treatment of preembryos. Some sources suggest placing limits on the ability to destroy preembryos, while others find such restrictions unnecessary.¹⁵⁴

147. *Davis*, No. 180, 1990 Tenn. App. LEXIS at 7.

148. *Id.* (citing *Hamby v. McDaniel*, 559 S.W.2d 774 (Tenn. 1977); *Durrett v. Owens*, 212 Tenn. 614, 371 S.W.2d 433 (1963); *Shousha v. Matthews Drivurself Serv.*, 210 Tenn. 384, 358 S.W.2d 471 (1962); *Hogan v. McDaniel*, 204 Tenn. 235, 319 S.W.2d 221 (1958)).

149. *Id.* at 9.

150. See generally Robertson, *supra* note 2, at 972-74 (discussing the gradual adoption of the "special status" view by various ethical and legal groups).

151. See *infra* text accompanying notes 155-61; see also Comment, *Protecting the Cryopreserved Embryo*, 57 TENN. L. REV. 507, 531-36 (1990) (discussing the value of adopting a middle ground approach for protecting human embryos).

152. Robertson, *supra* note 2, at 972.

153. *Id.*

154. See *Ethics Committee of the American Fertility Society*, *supra* note 112, at

This distinct view of the preembryo was first articulated in the United States by the Ethics Advisory Board ("EAB"),¹⁵⁵ a committee established by the Department of Health, Education, and Welfare in response to the first request for IVF research funding.¹⁵⁶ Charged with the task of evaluating the ethical aspects of IVF, the EAB stated in its 1979 report that "the human embryo is entitled to profound respect, but this respect does not necessarily encompass the full legal and moral rights attributed to persons."¹⁵⁷ In 1984 the British Warnock Committee took the same position, followed by the Ontario Law Reform Commission in 1985.¹⁵⁸ One year later, the "special status" view was also adopted by the AFS Ethics Committee.¹⁵⁹ The AFS stated that this special status view "imposes the traditional duty of reasonable prenatal care when actions risk harm to prospective offspring."¹⁶⁰ Less clear to the AFS was under what circumstances preembryos could be discarded or used for research.¹⁶¹

Both moral and legal conceptions of what kinds of beings deserve legal rights support granting special status to preembryos. Moral philosophy holds that "[f]or something to count as law it must have *some* connection with what can be morally justified, or it will be indistinguishable from a mere exercise of power."¹⁶² Ronald Dworkin contends that where difficult legal questions are posed, "judicial decisions must reach beyond legal rules already in

30S-31S (identifying an emerging consensus that preembryos deserve special respect but finding a divergence of views on whether preembryos may be discarded). For example, John Robertson maintains that a law prohibiting destruction of preembryos requires very strong justification because it would impose mandatory preembryo donation and unwanted biological offspring on IVF participants who cannot use all their preembryos. Robertson, *supra* note 2, at 981. Robertson believes this would be too "heavy [a] price to pay for a symbolic statement of commitment to human life generally." *Id.*

155. See *Ethics Committee of the American Fertility Society*, *supra* note 112, at 30S ("[T]he human embryo is entitled to profound respect, but this respect does not necessarily encompass the full legal and moral rights attributed to persons.")

156. For an explanation of the federal government's role in regulating IVF, see A. BONNICKSEN, *supra* note 21, at 77-79.

157. HEW Support of Research Involving Human In Vitro Fertilization and Embryo Transfer, 44 Fed. Reg. 35,033 (1979). In determining its position on the ethical aspects of IVF, the EAB "gathered oral testimony from 179 people, written testimony from eighteen others, and 2,000 items from interest groups and other citizens." A. BONNICKSEN, *supra* note 21, at 78-79.

158. *Ethics Committee of the American Fertility Society*, *supra* note 112, at 30S.

159. *Id.*

160. *Id.*

161. *Id.*

162. V. HELD, *RIGHTS AND GOODS: JUSTIFYING SOCIAL ACTION* 118 (1984).

place to certain moral principles."¹⁶³

The moral basis for the special status position lies in the body of philosophical thought that distinguishes between "human biological and human personal life."¹⁶⁴ While biological life is the period during which cellular human life exists, regardless of conscious functioning, personal life encompasses only a human's total conscious experience.¹⁶⁵ Personal life is necessarily a subset of biological life, since a prenatal entity is biologically alive before it is conscious. While both aspects of life have significance, only one's personal life is relevant in determining when a human being exists.¹⁶⁶ This is because rationality, or conscious thought, is the overriding characteristic that constitutes the essence of humanness and distinguishes the species from all other beings.¹⁶⁷ Just as

163. *Id.* at 119; see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1978) (discussing how judges deciding "hard cases" must identify preexisting, objective rights of parties despite the absence of applicable legal rules).

164. Engelhardt, *Medicine and the Concept of Person*, in *WHAT IS A PERSON?* 169, 171 (M. Goodman ed. 1988) ("Not all instances of human biological life are instances of human personal life. Brain dead (but otherwise alive) human beings, human gametes, cells in human cell cultures, all count as instances of human biological life.")

165. See Puccetti, *The Life of a Person*, in *WHAT IS A PERSON?*, *supra* note 164, at 265, 265. Puccetti states:

When one reflects on the life of a person, it becomes immediately apparent that this can be done in two very different ways. One way is to look upon the person as a particular organism with a spatio-temporal history of its own; there the identity question is approached from the outside, so to speak, and differs not at all from questions about the identity of material objects through time. The other way is to look upon the person's life history as the total span of conscious experience that this person has had; here identity is approached from the inside, whether it be your own life you are reflecting on, or that of another person. It was Lucretius' contention, in Book III of *De Rerum Natura*, that since good or harm can accrue only to a subject of conscious experiences, the latter is the correct view and the former leads to superstition.

Id.

166. See *id.* at 267 (stating that it is vain to "extend personhood" either "beyond the loss of capacity for conscious experience" or before such capacity exists); see also Engelhardt, *supra* note 164, at 172:

Insofar as we identify persons with moral agents, we exclude from the range of the concept person those entities which are not self-conscious. Which is to say, only those beings are unqualified bearers of rights and duties who can both claim to be acknowledged as having a dignity beyond a value (i.e., as being ends in themselves), and can be responsible for their actions.

Id.

167. See Callahan, *The "Beginning" of Human Life*, in *WHAT IS A PERSON?*, *supra* note 164, at 29, 38:

For the most part, historical efforts to define the nature of man have taken the form of a search for one overriding characteristic that constitutes man's essence. Boethius' classic definition of a person - '*Persona est substantia individua*

brain-death has come to signify the end of a human being's life despite ongoing biological functioning, the beginning of a human being's life must be related to the development of brain function, rationality, or conscious thought.¹⁶⁸

The special status view is most consistent with moral philosophy because it recognizes the difference between personal and biological life. The preembryo is not accorded the legal rights of a human being because at the preembryonic stage personal life has not yet begun. The preembryo is given special status, however, as a moral recognition of respect for biological life and the potential it possesses.

In addition, an understanding of the concept of legal rights supports the special status argument. In order to have legal rights, a being must be capable of having interests.¹⁶⁹ There are two reasons for this:

- (1) because a right holder must be capable of being represented and it is impossible to represent a being that has no interests; and (2) because a right holder must be capable of being a beneficiary in his own person, and a being without interests is a being that is incapable of being harmed or benefitted, having no good or "sake" of its own. Thus, a being without interests has no "be-half" to act in, and no "sake" to act for.¹⁷⁰

Preembryos are quintessentially beings without interests. As the philosopher Joel Feinberg notes, "[i]nterests are compounded out of desires and aims, both of which presuppose something like be-

rationalis naturae - reflects his work as a translator of Aristotle and, more broadly, the Greek tradition, which saw in rationality man's essence: man is a rational animal.

Id. (Boethius's definition translates as "personhood amounts to the individuating substance of rational nature.").

168. See Brody, *On the Humanity of the Fetus*, in *WHAT IS A PERSON?*, *supra* note 164, at 229, 232:

It is [the existence of electroencephalographic brain waves] which is used in determining the moment of death, the moment at which the entity in question is no longer a living human being. So, on the grounds of symmetry, it would seem appropriate to treat it as the moment at which the entity in question becomes a living being.

Id. (footnote omitted). Brody further contends that the brain function argument rests "upon the claim that the fetus becomes a living human being when it acquires that characteristic which is such that its loss entails that a living human being no longer exists." *Id.* at 248.

169. J. FEINBERG, *RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY* 167 (1980); see Robertson, *supra* note 64, at 445 ("Genetic uniqueness alone proves nothing if the cells in question lack other characteristics and hence lack interests.").

170. J. FEINBERG, *supra* note 169, at 167.

lief or cognitive awareness.”¹⁷¹ Based on this analysis, it has been argued that legal rights cannot accrue to inanimate objects, plants, and individuals with severe, irreversible brain damage.¹⁷² The same holds for preembryos.¹⁷³

Therefore, the special status argument is the soundest approach. It reflects recognition of the argument, expressed by Dr. Lejeune, that after fertilization there is a human, living entity, a unique biological life that compels respect. The special status view also recognizes the primitive state of that entity and the philosophical and legal reasons that legal rights should not be granted to such early life-forms. For these reasons, the special status view has the strongest support both nationally and internationally, and should serve as a guiding principle for state legislatures and judges in determining the status of the preembryo.

III. THE NATURE OF THE SPOUSES' INTERESTS

One of the main consequences of granting preembryos a special status is that resolution of the spouses' dispute is still left in question. It is clear that neither custody laws nor property distribution statutes are implicated under the special status view, but it is not clear what alternative approach should be adopted. To make this determination, the focus of the inquiry must shift to the nature of each spouse's rights, and the appropriate balance between them.

The first consideration in this area is whether either the husband or the wife has a fundamental constitutional right to procreate or to avoid procreation. If so, that spouse could challenge any unfavorable judicial decision or state law on constitutional grounds. If not, other methods for choosing between the spouses' interests must be explored.

171. *Id.* at 168 (emphasis omitted).

172. *See id.* at 160, 167-71, 176-77 (discussing the lack of legal rights accruing to rocks, plants, and humans in a persistent vegetative state).

173. Feinberg suggests that fetuses may be entitled to legal rights under the principle stated by Lord Coke: "The law in many cases hath consideration of him in respect of the apparent expectation of his birth." *Id.* at 179. However, Feinberg contends that there is a limit to granting rights to a being by virtue of its potential interests. There is a distinction between direct or proximate potentialities and those that are indirect or remote. Only entities with proximate potentialities are entitled to have their potential interests protected. Feinberg acknowledges that there may be borderline cases where classification will be uncertain or arbitrary. *Id.* at 183.

A. Constitutional Arguments

1. In Favor of Implantation

A woman in Mary Sue Davis's position might argue that she has a constitutionally protected right to procreate, which encompasses the right to have the preembryos implanted. Because such a right would be considered fundamental, it could be overridden only by a compelling state interest.¹⁷⁴ It is important to note that Mary Sue Davis would assert a positive right to bear children, as distinct from the right to avoid bearing children protected in cases such as *Roe v. Wade*¹⁷⁵ and *Planned Parenthood v. Danforth*.¹⁷⁶ To determine whether Mary Sue Davis possesses such a right, it is necessary to examine the extent to which the Supreme Court has protected procreative rights.

The only Supreme Court case to explicitly recognize a fundamental right to procreate is *Skinner v. Oklahoma*.¹⁷⁷ The *Skinner* Court held unconstitutional an Oklahoma statute that permitted sterilization of individuals convicted of two or more felonies involving moral turpitude. The basis of this ruling was the Court's determination that marriage and procreation are basic human rights.¹⁷⁸

The court implicitly recognized a fundamental right to procreate in dicta from two other cases. In *Meyer v. Nebraska*,¹⁷⁹ the Court held that constitutional liberties include one's right "to marry, establish a home and bring up children."¹⁸⁰ In *Eisenstadt v. Baird*,¹⁸¹ Justice Brennan stated, "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters

174. In *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Supreme Court established that certain rights are so basic and important that they deserve special judicial protection. State action that infringes on these fundamental rights would come under strict scrutiny by the Court and would be upheld only if narrowly tailored to achieve a compelling state interest. *Id.* at 541. For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court recognized the right to privacy as a fundamental right and applied a strict scrutiny standard of review. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW §§ 14.26-27 (1986) (tracing the development of a constitutionally protected right to privacy in sexual matters).

175. 410 U.S. 113 (1973).

176. 428 U.S. 52 (1976).

177. 316 U.S. 535 (1942).

178. *Id.* at 541.

179. 262 U.S. 390 (1923).

180. *Id.* at 399.

181. 405 U.S. 438 (1972).

so fundamentally affecting a person as the decision whether to bear or beget a child."¹⁸²

These three cases can be read to support Mary Sue Davis's asserted constitutional right to have the preembryos implanted, as this decision is clearly a decision to bear a child. For several reasons, however, past precedents have not guaranteed procreative rights in this context.

First, the Supreme Court has never addressed the applicability of the right to procreate when conception takes place by artificial means. Several legal scholars have presented strong arguments for extending the right to cover noncoital conception,¹⁸³ but the growth of reproductive technologies poses issues that the Supreme Court could not have anticipated and cannot fairly be said to have considered.¹⁸⁴ State courts that have addressed the constitutional issues surrounding artificial insemination have failed to offer clear guidance.¹⁸⁵ To recognize fundamental rights in these cases would require a significant extension of current constitutional protections.

182. *Id.* at 453 (emphasis omitted).

183. See, e.g., Andrews, *supra* note 84, at 359 (stating that "[i]t is not the coitus itself that this right to privacy protects but rather the fundamental nature and importance of having a child" (footnotes omitted)); Robertson, *supra* note 2, at 961 ("the reasons and values that support a right to reproduce coitally apply equally to noncoital activities involving external conception and collaborators"). But cf. Note, *The Use of In Vitro Fertilization: Is There a Right to Bear or Beget a Child by any Available Medical Means?* 12 PEPPERDINE L. REV. 1033, 1045-46 (1985) (Court decisions could be interpreted to protect only natural reproduction carried out privately, without outside assistance).

184. See Note, *supra* note 183, at 1041:

It is by no means clear that *Skinner* should be read so broadly as to encompass access to a medical procedure as an alternative to intercourse. The logic of *Skinner*, that justified protecting a man from sterilization, does not easily extend to justify protecting an infertile couple's use of a medical procedure at the same level. Further justification is required.

Id.

185. See, e.g., *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (Ch. Div. 1987). The *Baby M* trial court "reasoned that if one has the right to procreate coitally, then one has the right to reproduce noncoitally. If it is the reproduction that is protected, then the means of reproduction are also to be protected." *Id.* at 386, 525 A.2d at 1164. The New Jersey Supreme Court, however, reversed this decision on the grounds that the surrogacy contract conflicted with public policy and existing adoption legislation. *In re Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988).

In another surrogate motherhood case, the Supreme Court of Kentucky reasoned that impregnating a surrogate mother "is not biologically different from the reverse situation where the husband is infertile and the wife conceives by artificial insemination." *Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986). The court held that parental rights are the same regardless of the existence of a surrogacy contract but did not identify a constitutional basis for these rights. *Id.* at 213.

Second, the Court has generally limited its protection of the right to procreate to situations involving married couples.¹⁸⁶ State laws forbidding fornication and other sexual acts between unmarried persons have been found constitutional.¹⁸⁷ While the Court in *Eisenstadt v. Baird*¹⁸⁸ extended the right to privacy to childbearing decisions by both married and unmarried persons, its analysis focused on contraception and therefore dealt with the right to *avoid* childbearing, rather than the right to procreate. While the Court has extended contraception and abortion rights to unmarried women,¹⁸⁹ it was motivated by a desire to protect against unwanted pregnancies, unwed motherhood, and venereal disease.¹⁹⁰ The Court did not intend to create a general right to sexual privacy and procreation for unmarried persons.¹⁹¹ Therefore, a woman in Mary Sue Davis's position may be unsuccessful in asserting a constitutional right to procreate.¹⁹²

Last, the Supreme Court has never extended support for a right to bear a specific child; only a general right to maintain procreative function and make family-related decisions has been rec-

186. See Robertson, *Procreative Liberty and the Control of Conception, Pregnancy and Childbirth*, 69 VA. L. REV. 405, 415 (1983) ("When [Supreme Court] opinions mention procreation, they usually presuppose procreation within a marriage or a traditional family and assume that the conception and bearing of children will occur in a natural way.")

187. See J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 174, at 711 (summarizing cases in which state "lifestyle" statutes have passed constitutional scrutiny).

188. 405 U.S. 438 (1972).

189. See *Roe v. Wade*, 410 U.S. 113, 169-70 (1973) (Stewart, J., concurring) (Court's holding must protect the abortion decision equally for married and unmarried women); *Eisenstadt*, 405 U.S. 438 (extending the right to use contraception to unmarried individuals under equal protection).

190. See Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy — Balancing the Individual and Societal Interests*, 81 MICH. L. REV. 463, 537 (1983) (emphasizing the Court-recognized need to protect teenagers from unwanted pregnancies).

191. See *id.* at 527-38 (observing that in *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977), several Justices stated that they did not intend for the case to establish a constitutional right of sexual privacy for unmarried minors, and that in *Roe*, the Court rejected a broad right of individual autonomy allowing one "to do with one's body as one pleases"). But cf. Note, *Reproductive Technology and the Procreation Rights of the Unmarried*, 98 HARV. L. REV. 669 (1985) (arguing that the Court should extend procreative rights to unmarried persons).

192. Mary Sue Davis remarried shortly after her divorce. *Davis v. Davis*, No. 180, 1990 Tenn. App. LEXIS 642, at 1 (Ct. App. Sept. 13, 1990). This eliminated any problem with her being unmarried. It is likely, however, that many women will not be married at the time they assert the right to implantation. Moreover, the right to procreate within marriage, as previously affirmed by the Supreme Court, may not extend to include procreation with prior spouses.

ognized.¹⁹³ Therefore, Mary Sue Davis could not argue that constitutional precedents support a right to implant any of the contested preembryos in particular.

It is clear that under existing constitutional doctrine a woman does not have a right to implant preembryos. Recognizing such a right would require extensions of several aspects of the right to sexual privacy — which does not seem likely in light of the Court's recent privacy jurisprudence.¹⁹⁴

2. Against Implantation

It is also likely that Junior Davis could not rely on constitutional arguments, despite the *Davis* appellate court's recognition of a fundamental right in this case. He might argue that *Roe v. Wade*¹⁹⁵ establishes a fundamental right to prevent the birth of an unwanted child and that a man should be allowed to exercise this right in the IVF setting because assertion of this right would not force upon a woman the physical burden of undergoing an abortion. A close look at the reasoning behind *Roe*, however, suggests that its logic would not extend to the IVF context.

Underlying the Court's determination in *Roe* to protect the decision to terminate a pregnancy is a desire to avoid imposing significant gestational and childrearing burdens.¹⁹⁶ The Court specifically mentioned the medical risks associated with pregnancy, the mental and physical burden of child care, the stigma of unwed motherhood, and the psychological harm to the mother as reasons for its decision.¹⁹⁷ Since these burdens all fell on the pregnant woman, the Court gave the woman the right to avoid these burdens through abortion.

Junior Davis can not claim that he would suffer these same burdens. He would not be physically impaired by either the pregnancy or birth. He would not likely be forced to personally raise the child. He may not even be required to support the child financially.¹⁹⁸ The only harm that could reasonably be expected is the

193. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing the fundamental nature of marital and procreative rights under the equal protection clause of the Constitution).

194. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to extend right to privacy to include protection of consensual homosexual acts).

195. 410 U.S. 113 (1973).

196. *Id.* at 153.

197. *Id.*

198. By analogy, there is some precedent for releasing the father from legal responsi-

psychological burden of knowing an unwanted, biologically related child has been born, assuming a successful IVF process. While this kind of harm could be significant, the Court's decision in *Roe* does not indicate that this would be sufficient to trigger strict scrutiny analysis associated with a fundamental right. There is no suggestion in *Roe* that the Court intended to establish a right to prevent the birth of an unwanted child in any context other than a woman's right to an abortion.

In fact, Junior Davis might find the best indication of how the Supreme Court would treat his asserted right in *Planned Parenthood v. Danforth*.¹⁹⁹ In *Danforth*, the Court struck down a Missouri statute requiring spousal consent for an abortion, reasoning that since the state cannot regulate abortions during the first trimester of pregnancy, it cannot delegate to a spouse the power to do so.²⁰⁰ This demonstrates the Court's unwillingness to recognize in the husband a fundamental right to participate in the decision of whether his child will be born.²⁰¹

Despite *Danforth*, the *Davis* appellate court recognized Junior Davis's right not to beget a child where no pregnancy had occurred. The *Davis* court's sole support was the Supreme Court's statement that "[t]he decision whether to bear or beget a child is a constitutionally protected choice."²⁰² In *Schochet v. State*,²⁰³

bility for a child in such a case. In *Lehr v. Robertson*, 463 U.S. 248 (1983), and *Parham v. Hughes*, 441 U.S. 347 (1979), the Supreme Court narrowly construed the responsibilities of absent fathers to their illegitimate children, despite the genetic tie. Also, several states have laws providing that sperm donors do not have financial obligations to their genetic children. See Wagner, *The Contractual Reallocation of Procreative Resources and Parental Rights: The Natural Endowment Critique*, 41 CASE W. RES. L. REV. 1, 90-91 (1990). Seventeen states have adopted a uniform act providing that "[t]he donor of semen is treated in law as if he were not the natural father of a child thereby conceived." UNIF. PARENTAGE ACT, 9B U.L.A. 287, § 5(b) (1973). Other states have enacted statutes that "generally adopt the [Uniform Parentage] Act's basic pattern." Wagner, *supra* at 91. But cf. *Robertson*, *supra* note 64, at 477 (suggesting that since a sperm donor engages in a transaction making offspring possible, the traditional rule of imposing legal responsibility on the father may be justified).

199. 428 U.S. 52 (1976).

200. See *id.* at 69 (recognizing "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying" but refusing to recognize that the husband has a fundamental right in this context).

201. Justice Stevens suggested, in a concurring opinion, that the Court erred by not addressing the issue of men's rights in a more substantial way. *Id.* at 90.

202. *Davis v. Davis*, No. 180, 1990 Tenn. App. LEXIS at 5 (Ct. App. Sept. 13, 1990) (quoting, with immaterial errors, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977), and citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *In re Romero*, 790 P.2d 819, 822 (Colo. 1990)).

however, the Maryland Court of Appeals stressed the importance of applying this statement cautiously,²⁰⁴ noting the dangerous tendency of courts to apply the words out of context.²⁰⁵ Application of this precept has been limited to the contexts of contraception and abortion.²⁰⁶ The recognition by the *Davis* appellate court of Junior Davis's right not to beget a child thus rests on unstable ground and is probably improper in view of *Danforth*.²⁰⁷

Although both spouses may seek to preserve interests that share characteristics with rights previously upheld by the Supreme Court, neither spouse can safely rely on a constitutional argument in this case. While there may be procreative rights involved, they are not fundamental. Thus, judges and legislatures are free to resolve this conflict in any manner rationally related to a legitimate state objective.²⁰⁸

B. Suggested Approaches

The best approach to disputes over the disposition of frozen preembryos remains to be determined. Scholars in the field of medical ethics have offered several ideas. Some wrote articles at a time when this kind of conflict could only be imagined,²⁰⁹ while others have written recently, specifically in response to the *Davis* controversy.²¹⁰

203. 75 Md. App. 314, 541 A.2d 183 (1988).

204. *Id.* at 328, 541 A.2d at 190.

205. *Id.* at 331, 541 A.2d at 191.

206. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977):

The decision whether or not to beget or bear a child holds a particularly important place in the history of the right to privacy, a right first explicitly recognized in an opinion holding unconstitutional a statute prohibiting the use of contraceptives and most prominently vindicated in recent years in the contexts of contraception and abortion

Id. (citations omitted).

207. See 428 U.S. 52 (1976) (discussed *supra* text accompanying notes 199-201). The *Davis* appellate court did not consider *Danforth* in its opinion.

208. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 174, at 530 (discussing the rational basis test).

209. See, e.g., Note, *Embryo Transplant, Parental Conflict, and Reproductive Freedom: A Prospective Analysis of Issues and Arguments Created by Forthcoming Technology*, 15 HOFSTRA L. REV. 609, 610-11 (1987) (analyzing treatment of the hypothetical situation where the father favors transfer and implantation of a preembryo against the woman's wishes).

210. See, e.g., Robertson, *Resolving Disputes over Frozen Embryos*, HASTINGS CENTER REP. Nov./Dec. 1989, at 7 (1989) (discussing methods to promote orderly disposition of frozen embryos); Robertson, *supra* note 64, at 473-75 (discussing the *Davis* case as an example of the difficulties that may arise when couples give no advance instructions as

Most scholars agree that any rule that might apply would be a default rule, operating only when the spouses have neglected to specify a means of resolution at the outset.²¹¹ Any such rule must resolve these disputes fairly and consistently, and should apply equally whether it is the husband or the wife who objects to implantation. Two possible rules that could effectively govern the outcome of these kinds of cases are presented and evaluated below

1. The Double Consent Rule

One approach would be to require mutual spousal consent as a prerequisite to implantation of all preembryos created through IVF. This approach would require obtaining consent twice from each spouse — once when the IVF procedure is initiated and again before each implantation. In the event that one spouse refuses to consent at the implantation stage, the preembryos would be automatically discarded or, at the spouses' mutual choice, donated to another couple. In the event of the death of one spouse, the other could proceed with implantation absent a specified agreement otherwise.

There are several advantages to adopting such a rule. It takes into account the period of delay that may occur between attempts at implantation by ensuring that both spouses continue to support the important decision to have a child. Such a rule would apply equally to both spouses in protecting them from becoming parents against their will. In addition, this approach would promote consistency in the treatment of these disputes and would prevent the kind of litigation sparked in the *Davis* case.

This rule would also have disadvantages, however. Most significantly, it would grant tremendous power to one spouse over the other. It would mean that even though both spouses initially consented to having a child through IVF, neither could proceed with certainty that the other would not truncate the process. Such an outcome would surely frustrate the spouse seeking implantation, who will have invested large financial expense,²¹² time, energy,

to frozen embryo disposition).

211. See, e.g., Robertson, *supra* note 210, at 12 (recommending that any legal rule adopted take effect only if couples fail to resolve the dispute independently). See generally Robertson, *supra* note 64, at 473 (discussing the problems arising from the absence of pre-negotiated disposition agreements).

212. A 1988 survey of 146 IVF clinics in the United States indicated that the aver-

and, in the wife's case, physical pain. The required second consent for implantation could become a tool for manipulation and abuse between spouses, especially under circumstances of a pending divorce. Any spouse ultimately denied the chance to have a child through IVF would probably suffer considerable emotional stress.

2. The Implantation Rule

A second approach would allow implantation if both spouses initially consent to IVF, even where one spouse later objects, so long as the spouse that wants to continue the process accepts sole legal responsibility for any resulting children. Under this rule, a spouse who initially consents to IVF would have no power to interrupt the process later on.

Under this approach, disputes will entail one of two consequences. When the husband objects to implantation, this rule would allow the wife to prevail but would absolve the husband from all legal responsibility for any resulting children. It would also strip the husband of all parental rights with respect to the children. When the wife objects to implantation, this rule would allow the husband to have the preembryos implanted in another woman. Here, the genetic mother would be deprived of parental rights and absolved of all legal responsibility. This second scenario might occur if the husband becomes sterile in the period following the creation of the preembryos, and their implantation becomes his only opportunity to father a biologically related child.²¹³

There are three advantages to this approach. First, it would encourage very careful deliberation by spouses considering IVF; they would know at the outset that they are making a commitment to a process that neither spouse alone could interrupt. Such careful consideration would likely reduce the number of subsequent disputes. Second, this rule would guarantee the opportunity to follow the IVF process through to completion to those spouses who invest their time, money, and hope in this process. Third, this rule would offer consistency in the treatment of such disputes and prevent litigation in this area.

There is one significant disadvantage to this approach. The

age cost of one IVF procedure ranges from \$4,000 to \$7,000. *In Vitro Hearings*, *supra* note 20, at 316-1300 (full text of subcommittee's report).

213. See also *supra* note 10 (after remarriage to a new wife who can not bear children, the husband in *Davis* is seeking custody of the embryos for implantation in a surrogate mother).

implantation rule could result in a child being born against the wishes of one of its genetic parents. While the child's birth would not force legal or financial responsibility upon the unwilling parent, it might cause psychological harm to both the parent and the child.

3. Determining the Better Rule

In choosing between these two rules, two factors must be considered: fairness to the parties and minimizing harm to the losing party²¹⁴ These factors are independent. For example, the rule that most fairly decides which spouse will prevail may also be the rule that causes the losing spouse to incur the most legal, emotional, and financial harm. An evaluation of these two factors, however, demonstrates that the implantation rule is preferable on both counts.

Fairness considerations require a determination of whether it would be more equitable to allow the spouse who wants to prevent the possibility of a birth to prevail, or instead to allow the spouse who wants to continue the process of procreation to prevail. One fact is of vital importance in making this judgment: the spouse who opposes implantation wanted a child at one time and submitted to the IVF process with that end in mind. The two spouses once agreed on this issue and initiated the IVF procedure in reliance on that mutual wish. Given this background, the greater injustice would be to deny implantation to the spouse who detrimentally relied on the other's words and conduct.

Protection against this sort of injustice is recognized by the well-established doctrine of estoppel. The doctrine of estoppel states: "As a general rule, where a person has, with knowledge of the facts, acted or conducted himself in a particular manner he cannot afterward assume a position inconsistent therewith to the prejudice of one who has acted in reliance on such conduct

"²¹⁵ There are two requirements for the application of estoppel: "the party against whom the estoppel is claimed must have done some act or pursued some course of conduct with knowledge

214. See generally J. GLOVER, ETHICS OF NEW REPRODUCTIVE TECHNOLOGIES - THE GLOVER REPORT TO THE EUROPEAN COMMISSION 24-31 (1989) (discussing the utilitarian approach, which focuses on each party's gains and losses, and the dignity approach, which focuses on the respect with which each party should be treated, to resolving conflicts arising from the use of reproductive technologies).

215. 31 C.J.S. *Estoppel* § 108(a) (1964).

of the facts and of his rights, and, in addition, it is essential that the party claiming the estoppel should have been misled to his prejudice.”²¹⁶ When these requirements are met, the doctrine of estoppel prevents the estopped party from acting other than in accordance with the expectations of the other party. The underlying goal of the rule is to protect “those who have been misled by that which on its face was fair.”²¹⁷

The elements of estoppel are satisfied in a dispute such as *Davis*. The knowing action of the objecting spouse is the undertaking of IVF for the purpose of producing a child. The prejudice to the other spouse consists of the time, money, and psychological commitment necessarily expended in pursuing the full procedure. The injury would include not only the time and money spent, but also the lost opportunity to have a child.

The law of estoppel serves as a guideline in deciding whether the implantation rule or the double consent rule is more fair. The estoppel doctrine indicates that the unfairness to the objecting spouse is outweighed by the unfairness to the spouse who wants to complete the IVF process. As stated in an amicus curiae brief filed in the *Davis* case:

At the time the plaintiff donated, gave, offered, furnished and delivered his sperm to the Fertility Center (albeit artificially [sic]) he gave up control of his reproductive function just as he would [have] if he deposited the sperm naturally in his wife, and he should be estopped from asserting any legal rights thereto.²¹⁸

The doctrine of estoppel would prevent the spouse opposing implantation from frustrating the other spouse's desire to complete the IVF process. This result is reached only through the implantation rule. The double consent rule does not estop the opposing spouse from withdrawing consent. Thus, the implantation rule is the fairer rule.

The second consideration in choosing between the implantation and double consent rules is the extent of the harm posed by each rule. This factor has been analyzed by Professor John Rob-

216. *Id.* § 108(b).

217. *Id.* § 1(a).

218. Brief of Amicus Curiae, R.D. Hash, at 3, *Davis v. Davis*, No. E-14496, 1989 LEXIS 641 (Cir. Ct. Sept. 21, 1989), *rev'd*, No. 180, 1990 Tenn. App. LEXIS 642 (Ct. App. Sept. 13, 1990).

ertson in the context of the *Davis* case.²¹⁹ Robertson maintains that the harm of losing would be much greater for Junior Davis because he would bear a lifelong psychological and legal burden, while Mary Sue Davis would only have to find another means of having a child if she lost.²²⁰

Robertson's analysis, however, overlooks several important considerations. First, the spouse opposing implantation would not necessarily bear legal responsibility for any resulting children. The implantation rule proposed here recognizes that imposing continued legal responsibility on the objecting spouse would be unfair and exempts the objecting spouse from traditional rules requiring such responsibility.²²¹ Second, there may be no psychological burden placed on the objecting spouse. It is possible that, like scores of sperm donors, the spouse could live undisturbed despite the existence of genetic offspring. It is also possible that the objecting spouse would want to develop a positive relationship with any resulting child. In such a case, the spouse could choose to shoulder full legal responsibility for the child, thus acquiring full parental rights. This might have been the result in the *Davis* case if implantation had occurred, since Junior Davis expressed a desire to provide financial support and secure visiting rights if a child were born from the preembryos.²²²

The third problem with the Robertson analysis is its undervaluation of the cost of losing for the spouse favoring implantation. Robertson states that this spouse need merely find another means of having a child. Finding an alternative means, however, might pose significant difficulties, especially for the wife. A woman left in this situation would have to start the IVF process all over again. This would entail spending at least another \$5,000 to \$7,000, undergoing fertility drug therapy and, perhaps, surgery. Unless she remarries, the wife will likely be precluded from IVF,

219. See Robertson, *supra* note 210, at 7; Robertson, *supra* note 64, at 477-81 (discussing the types of harm arising from the imposition of involuntary parenthood, including the financial and psychological burdens of unwanted reproduction and the burden of seeking alternative means of producing biological offspring).

220. Robertson, *supra* note 68, at 8. Robertson notes elsewhere, however, that if the spouse seeking implantation becomes biologically incapable of reproducing, "the equities tip in favor of [that spouse] because the pleasures of parenthood [are] deeper and more intense than the discomfort of unwanted biologic offspring." Robertson, *supra* note 64, at 481.

221. See *supra* note 198 and accompanying text.

222. Curriden, *supra* note 46, at 70.

since most clinics presently restrict IVF to married couples.²²³ Even assuming that the wife could obtain IVF treatment, the delay might affect her fertility, further decreasing her chances of having a child. Robertson's analysis ignores the frustration and despair a woman is likely to suffer under these circumstances. For the wife in particular, Robertson undervalues the cost of finding an alternative means of having a child.

The conclusion from this harm analysis is that the potential harm to the objecting spouse is not nearly as great as the harm facing the spouse who wants to complete the IVF process. While the first spouse's harm amounts to a possibility of psychological discomfort, the second spouse would incur that same discomfort along with the very real financial, physical, and emotional burdens of starting over again, possibly with a lower chance of success. In the interest of reducing the total harm to both spouses, the implantation rule is clearly the better choice.

C. Accounting for the Preembryo's Special Status

The special status granted to preembryos is grounded in respect for their potential and thus supports the implantation rule. Protection of the potential life of a fetus is an issue that has arisen in several abortion cases considered by the Supreme Court. In *Roe v. Wade*,²²⁴ the Court recognized a state's "important and legitimate interest in protecting the potentiality of human life,"²²⁵ though holding the state's interest compelling only at the point of fetal viability.²²⁶ In two more recent abortion cases, Justice O'Connor insisted that the state's interest in protecting the potentiality of human life exists throughout pregnancy.²²⁷ The Court's belief that society's interest in preserving potential life is strong enough to affect treatment of prenatal entities is shared to a certain degree by those who claim preembryos have a special status.

The special status view does not assert that preserving potential life is so important that preembryos should be implanted whenever eggs are fertilized extracorporeally. This result would be

223. AMERICAN FERTILITY SOC'Y, INVESTIGATION OF THE INFERTILE COUPLE 45 (1986), reprinted in *In Vitro Hearings*, *supra* note 20, at 71.

224. 410 U.S. 113 (1973).

225. *Id.* at 162.

226. *Id.* at 164-65.

227. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

too harsh, forcing IVF participants to implant more preembryos than they desire and probably more than a woman can physically bear. The alternative of donating any "extra" preembryos to anonymous recipients would equally undermine the control of IVF participants over their genetic material.

Rather, the special status of preembryos argues for implantation of preembryos when at least one spouse favors that choice. When one spouse wishes to further the preembryo's development and the other wishes for its destruction, the choice should be to protect the preembryo's human life potentiality. As one medical ethicist stated, in a discussion of the *Davis* case, "What makes an embryo valuable is its potential to develop to become a member of the human community. The wife in this case wants to have that value upheld, and in that, I think she has values that we could endorse for society."²²⁸

Therefore, in a spousal dispute over the disposition of preembryos, where fairness, harm, and the preembryo's status are all considered, the preference for implantation is compelling. The implantation rule set forth above²²⁹ affords respect for the spouses' interests as well as the preembryos at the center of the dispute.

CONCLUSION

Ideally, every married couple would have the ability to bear a child by natural means, and every decision to have a child would be supported by both spouses. However, the courts must establish law to resolve cases where neither of these ideals obtain. When couples have no choice but to rely on IVF for childbearing and when one spouse changes his or her mind about the procedure after it has begun, the disputes that arise demand legal analysis of issues with little precedent. Established legal principles must be employed to resolve these modern conflicts appropriately.

One such principle is that early life-forms have a special status that requires moral, but not legal, recognition. Applying this principle to the present case indicates that preembryos have no legal entitlement to implantation. The special respect they should be accorded may suggest, however, that in the balance between the spouses' rights, the spouse favoring implantation has a greater

228. K. Nolan, M.D., *The MacNeil/Lehrer Newshour*, LEXIS/NEXIS Macleh file, transcript no. 3531, at screen 23 (PBS television broadcast, Aug. 7, 1989).

229. See *supra* section III.B.2 of this text.

interest.

Another such principle is the doctrine of estoppel. Applying estoppel to the facts of a controversy such as *Davis* also supports the spouse who favors implantation. Detrimental reliance in this context is perhaps more deserving of recognition than in any other. Therefore, the implantation rule, allowing the spouse who wants to implant the preembryos to prevail conditioned on that spouse's acceptance of sole legal responsibility for any resulting child, offers the best solution.

A final such principle is that legal rules should minimize the total harm to disputants. Applying this principle to spouses who are in dispute over the disposition of their frozen preembryos, the better rule would be to allow implantation. Allowing implantation harms the unwilling spouse less than disallowing implantation would harm the willing spouse.

The implantation rule should be implemented in the near future, so that IVF participants will be better protected from the vacillation of their spouses than they are at present. This rule will force spouses who are unsure about having a child to think more carefully before beginning the IVF process. Those individuals who ultimately pursue IVF will be secure in the knowledge that only medical impossibility, not the law, will prevent them from having the children they desire.

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